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Morijn, John

Published in:
International Journal of Constitutional Law

DOI:
[10.1093/icon/moz030](https://doi.org/10.1093/icon/moz030)

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Document Version
Publisher's PDF, also known as Version of record

Publication date:
2019

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Morijn, J. (2019). Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond. *International Journal of Constitutional Law*, 17(2), 617-640. <https://doi.org/10.1093/icon/moz030>

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Responding to “populist” politics at EU level: Regulation 1141/2014 and beyond

John Morijn*

This article presents and analyzes the EU values compliance mechanism as set up in Regulation 1141/2014, and amended by Regulation 2018/673, on the statute and funding of European political parties and European political foundations. It assesses to what extent this Regulation, that has been perceived and presented as targeting “populists,” provides a comprehensive response to illiberal politics at EU level, and what lessons can be drawn from its origin for the application of other values compliance based instruments such as Article 7 TEU. For that purpose it tracks the Regulation’s drafting history in considerable detail and critically assesses the outcome. It concludes that the Regulation offers a limited and limiting framework to act against illiberal political forces within the European Parliament, because it is unlikely to work in disciplining mainstream political groups and parties that harbor illiberal elements associated with Article 2 TEU-related problems in various member states. At the same time, the article identifies elements of the mechanism that provide opportunities to help shape a more effective EU response to rule of law backsliding across Europe.

1. Introduction

In recent years there has been intense European Union (EU)-level debate and activity in an effort to address illiberalism and rule of law backsliding across Europe. The main focal point has been the procedure laid down in Article 7 of the Treaty on European Union (Article 7 TEU). That article lays down a procedure for EU-level action in case a member state’s actions contravene the “EU values” laid down in Article 2 TEU. That article articulates the very legal and political foundations upon which EU cooperation is to take place. It reads as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging

* Assistant professor of European human rights law, University of Groningen, Department of European Law; Emile Noël Global Fellow (Jean Monnet Center at NYU School of Law) 2018–2019 (on leave from the Dutch Ministry of the Interior and Kingdom Relations). Email: j.morijn@rug.nl. All opinions expressed are strictly my own.

to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹

Even if it is not that long ago that EU-wide stable compliance was thought of as a matter of course, times have changed quickly. The European Commission (Commission) has had to launch an Article 7 TEU procedure against Poland.² The European Parliament (Parliament) also called on the Council to trigger the same procedure regarding Hungary.³ The Parliament also adopted further resolutions reacting to specific rule of law backsliding developments in other member states⁴ and called on the Commission to propose a mechanism to monitor the rule of law in all member states periodically.⁵ These activities have in common that they attempt to generate EU-level pressure to secure member state-level compliance with Article 2 TEU. All of them have benefited from considerable scholarly discussion.⁶

What has drawn less attention is that another Article 2 TEU compliance mechanism, focused on the EU level instead of the member state level was beefed up as well. Regulation 1141/2014 (Regulation) on the statute and funding of European political parties and European political foundations (Regulation),⁷ recently further amended by Regulation 2018/673,⁸ reconfirmed that European political parties (EuPP, Europarties)⁹ and

¹ For an analysis of this provision, including whether and to what extent the principles listed in Article 2, second sentence, have a different status from those in the first sentence, cf. Markus Klamert & Dmitry Kochenov, *Article 2 TEU*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS* 15–16 (point 5) (Manuel Kellerbauer, Marcus Klamert, & Jonathan Tomkin eds., 2019). For a convincing argument that “values” are not just vague aspirations but (binding) fundamental principles of Union law, see Dmitry Kochenov, *The Acquis and Its Principles—The Enforcement of the “Law” versus the Enforcement of “Values” in the EU*, in *ENFORCEMENT OF EU LAW AND VALUES* 1, 1 (Dimitry Kochenov & Andras Jakab eds., 2017).

² European Commission, Reasoned Proposal in Accordance with Article 7(1) of the TEU regarding the Rule of Law in Poland, COM(2017) 835, December 20, 2017.

³ European Parliament, Resolution of September 12, 2018, A8-0250/2018, on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

⁴ For some recent examples, see European Parliament Resolution of November 15, 2017, 2017/2935 (RSP), on the rule of law in Malta; European Parliament Resolution of April 19, 2018 (2018/2628(RSP), on protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová); European Parliament Resolution of November 13, 2018, 2018/2844(RSP), on the rule of law in Romania; European Parliament Resolution of December 13, 2018, 2018/2975(RSP), on conflicts of interest and the protection of the EU budget in the Czech Republic.

⁵ European Parliament Resolution of October 25, 2016, A8-0283/2016, with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights.

⁶ Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 *CAMBRIDGE Y.B. EUR. STUD.* 3 (2017); Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 *EUR. L.J.* 141 (2015); R. Daniel Kelemen, *Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union*, 52 *GOV’T & OPPOSITION* 211 (2017); John Morijn, *Post-Lisbon Civil Rights Protection by the EU’s Political Institutions*, in *CIVIL RIGHTS AND EU CITIZENSHIP* 14 (Sybe de Vries, Henri de Waele, & Marie-Pierre Granger eds., 2018).

⁷ Regulation 1141/2014 on the statute and funding of European Political Parties and European Political Foundations, OJ EU L 317/1, November 4, 2014.

⁸ Regulation (EU, Euratom), 2018/673, amending Regulation 1141/2014, OJ EU L 114 I/1, May 4, 2018.

⁹ “A European political party is a [structured cooperation between political parties and/or citizens] which pursues political objectives and is registered with the [APPF].” Article 2(3) juncto Article 2(2).

European political foundations (EPF, Foundations)¹⁰ can only receive EU funding if, and as long as, they respect Article 2 TEU. The Regulation considerably strengthened compliance verification possibilities for this existing obligation by setting up the independent Authority for Political Parties and Foundations (APPF, Authority) to register, monitor, and sanction EuPP and EPF, and a Committee of Independent Eminent Persons (CoIEP, Committee) to help it with research about EU values compliance.

This Regulation, first proposed in 2001, was sensitive from the outset. It was perceived by (right-wing) “populists” as specifically targeting them. Member states with governments nationally led by or reliant on the support of extreme right-wing parties initially blocked it in the EU institution they gather in, the Council of Ministers, and were subsequently outvoted.¹¹ Elsewhere, after failing to block it in the Parliament, several groups of right-wing populists unsuccessfully challenged its legality.¹² The Regulation’s more recent reform in 2017, making it impossible for different members of European Parliament representing one national party to support more than one EuPP at a time,¹³ was called for and supported by “mainstream” parties to target practices of right-wing populists¹⁴ (who often supported more than one Europarty).¹⁵ The Commission, taking up this request, also framed the effort as such.¹⁶ In that light it is hardly surprising that negotiations about beefing up values verification between 2012 and 2014—the focus of this article—were protracted. In fact, they were two discussions wrapped into one.

First there was the new mechanism itself. The concern was how and by whom EU-level verification should be undertaken for it to be credible yet politically balanced and effective. An underlying second concern, given the close connection between member state and EU-level political parties, was how any solution would spill over into other EU activities focusing on guaranteeing Article 2 TEU compliance directed at the member state level, primarily Article 7 TEU. The compliance mechanism’s drafting history and final set-up therefore tell a story not only about how the response to illiberal politics was sharpened at EU level below the radar. It also constitutes a rare and

¹⁰ “A European political foundation is an entity formally affiliated with a [EuPP] which through its activities underpins and complements the [EuPP] objectives by performing [tasks such as]: (a) observing, analysing and contributing to the debate on European public policy issues . . . ; (b) developing activities linked to European public policy issues . . . ; (c) developing cooperation in order to promote democracy . . . ; and (d) serving as a framework for national political foundations, academics, and other relevant actors to work together at European level. Article 3(4).

¹¹ Simon Lightfoot, *The Consolidation of Europarties? The “Party Regulation” and the Development of Political Parties in the European Union*, 42 REPRESENTATION 303, 307 (2006).

¹² See Section 3.

¹³ Article 3(1)(ba)—adapted by Regulation 2018/673.

¹⁴ European Parliament Resolution of June 15, 2017, 2017/2733(RSP), on the funding of political parties and political foundations at European level. The detailed voting record can be found at <https://www.votewatch.eu/>.

¹⁵ For a good analysis of the rules in force before these changes, see Wouter Wolfs, *EU Party Funding: A Pro-European Instrument to Support Euroscepticism?*, 2017 OECD GLOBAL ANTI-CORRUPTION & INTEGRITY FORUM (2017).

¹⁶ In his 2017 State of the Union address the Commission President stated: “Today the Commission is proposing new rules on [EuPP/EPF] financing. . . . We should not be filling the coffers of anti-European extremists,” State of the Union, September 13, 2017, p. 18, available at https://ec.europa.eu/commission/sites/beta-political/files/state-union-2017-brochure_en.pdf.

detailed on-the-record account of a legislative discussion about normative and institutional questions relating to Article 2 TEU compliance verification.

This article presents and analyzes the Regulation's EU values compliance mechanism. It assesses the nature and usability of each of its elements, and investigates what lessons it could teach about safeguarding Article 2 TEU generally. It shows that the Regulation's values compliance mechanism offers a problematically limited and limiting framework to act against parliamentary illiberal actors. As a matter of law and inter-institutional setting the mechanism appears tailored to single out only a subset of problematic illiberals, namely those united in a single European political party. Crucially, those illiberal elements that the EU has so far attempted to target are part of *other* Europarties. It is assessed whether and how this evident shortcoming could be corrected. In addition, the article identifies the Regulation's further elements which, if acted upon properly and in combination with Article 2 TEU compliance instruments focused on the member state-level such as Article 7 TEU, may provide previously unexplored opportunities to help safeguard the rule of law.

The analysis begins by providing normative and factual context about the relation between (different forms of) "populism" and Article 2 TEU, and where those characterized as "populists" sit in Parliament (Section 2). It then tracks in detail the Regulation's drafting history, from when it was first discussed in 2001 to its four consecutive versions of 2003, 2007, 2017, and 2018 (Section 3). The article next analyzes the resulting regulatory solution. It identifies issues to be interpreted with a view to operationalizing the Regulation's values verification mechanism vis-à-vis populism-associated illiberalism and signals how this could inform, and work in tandem with, other such EU instruments (Section 4). Finally, Section 5 presents a brief conclusion.

2. Normative and factual context

As was pointed out earlier and will be elaborated more fully below, linking EU funding for EuPP and EPF to registration requirements and adherence to EU basis values was initially perceived and more recently more openly presented as targeting some forms of "populist" politics at the EU level. Populism, however, is a nebulous term.¹⁷ It is not defined as a matter of Union law. Rather, what is seen as problematic about it needs to be inferred from the Union law and regulatory practice. It is nonetheless instrumental to start the analysis by clarifying in what forms and with what substantive focus politics often described

¹⁷ Often three different ways of viewing "us versus them" politics are distinguished: a view of politics (populism as a way of defining democratic politics generally as a necessarily permanent struggle between two opposing camps with views that cannot be reconciled), a political strategy (populism as a polarizing "underbelly"-style to achieve political aims), or an additional ideology (populism attaching to any other substantial political agenda as a "thin" (i.e. substantively empty) ideology relying on certain beliefs about the relative importance of the view of the people); cf. CRISTÓBAL ROVIRA KALTWASSER ET AL., EDS., *THE OXFORD HANDBOOK OF POPULISM* (2018). The latter, "ideational" approach, is seen as dominant. It argues that populism "should be defined as a set of ideas that not only depicts society and divided between 'the pure people' versus 'the corrupt elite,' but also claims that politics is about respecting popular sovereignty at any cost." Cf. Cas Mudde & Cristóbal Rovira Kaltwasser, 51 *COMP. POL. STUD.* 1, 4 (2018). For a discussion of limitations of using these definitions of populism in the context of assessing challenges to liberal democracy, see John Morijn, *Review of Mark Tushnet et al. (eds.), Constitutional Democracy in Crisis? (2018)*, *EUR. CONST. L. REV.* (forthcoming 2019).

as “populist” occurs in Europe, and how that links to the primary Union law of Article 2 TEU (Section 2.1). Section 2.2 will then clarify where “populist” political actors sit in the Parliament.

2.1. Normative context

In mapping “populist” parties in the EU member states, well-known populism scholar Mudde¹⁸ has included such varied actors as Hungarian Fidesz and Jobbik, Polish PiS, The Finns, Danish People’s Party, Greek Syriza, Spanish Podemos, German Alternative für Deutschland (AfD), Italian Movimento 5 Stelle (M5S) and Lega, French Front National (now: Rassemblement National), Dutch Party for Freedom (PVV), Austrian FPÖ, Slovak Smer-Direction, UK Independence Party, and Belgian Flemish Interest. Also right-wing extremists such as the Greek Golden Dawn could be added. Based on the previously described rule of law resolutions of the European Parliament, and the situations described therein, some would also include the Maltese Labour Party, the Romanian Social Democrats, and Czech ANO as parties deserving of scrutiny based on Article 2 TEU. But what do all these parties have in common, where are they distinct, and how could this be assessed as a matter of (Union) law?

In a report about populism, the Council of Europe recently distinguished a number of general features, including pressures to dismantle checks and balances, undermining human rights and challenging international checks on unrestrained state power.¹⁹ Brubaker provides a useful schematic distinction between substantive populisms in Northern and Western European (NWE), Central and Eastern European (CEE), and Southern European (SE).²⁰ NWE populism draws a contrast not in national but in broader civilizational terms (a threat from Islam). It embraces Christianity not as a religion but as a culture, and secularism to minimize the visibility of Islam in the public sphere. Paradoxically, some human rights (particularly free speech and gender issues) are selectively championed to contrast with Islamic illiberalism.²¹ CEE populism does view Christianity as a religion, leading to a defense of family values and a rejection of secularism and human rights as externally imposed. SE populism is principally concerned with the implications of economic austerity and corrupt political elites. Of course, there are many instances in which these types occur in mixed ways or cooperate, exemplified by the cooperation between M5S and Lega in Italy.

In combination, this roughest of characterizations allows us to show how these varied political agendas have both overlapping and distinctive features. It facilitates a basic sketch of how each relates to what is binding (and therefore actionable) as a matter of Union law, Article 2 TEU. “Populist” actions may lead to a *different spread of tensions* with different EU values. More specifically, *all* sustained illiberal action typically involves an attempt at limiting debate, delegitimizing dissent, and reducing political

¹⁸ Cas Mudde, *Populism in Europe: A Primer*, OPEN DEMOCRACY (May 12, 2015), <https://www.opendemocracy.net/can-europe-make-it/cas-mudde/populism-in-europe-primer>.

¹⁹ Council of Europe, *Populism—How Strong Are Europe’s Checks and Balances?*, ANN. REP. 6 (2017).

²⁰ Rogers Brubaker, *Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective*, 40 ETHNIC & RACIAL STUD. 1191 (2017).

²¹ *Id.* at 1193–1194.

pluralism. Free media, civil society, the judiciary, and parliamentary authority are all targeted and systematically discredited²² as part and parcel of the “elite.” From the viewpoint of Article 2 TEU, it is clear that the values of pluralism, non-discrimination, and democracy are at stake if the voice and interests of those not considered part of “the people” are systematically excluded. The EU values of freedom, the rule of law, justice, and political rights such as freedom of speech are put in jeopardy by purely partisan appointments of judges, or when NGOs are undermined. In this sense *any* illiberal action strikes at the EU’s normative foundations.

Depending on the substantive agenda, however, quite *different* Article 2 TEU values are triggered. NWE right-wing xenophobic extremism stands in tension with tolerance, minority rights, and freedom of religion (particularly for European Muslims). CEE traditionalist nationalism is likely to come into tension with non-discrimination, gender equality, and LGBTI rights specifically. The SE populist focus on implications of dominant economic policy (including the EU’s role) concerns principally the Article 2 TEU value of solidarity—and perhaps actually a call to give it substance.

2.2. Factual context

How do said populist parties, and the Article 2 TEU tensions their actions potentially entail, translate into the European Parliament (EP)? As shown above Europarties are a cooperation between national political parties from a particular *famille spirituelle*.²³ The membership must originate from at least one-quarter of the member states.²⁴ In order to receive EU funding, at least one Europarty-member should hold a seat in the European Parliament.²⁵ Elected members of the European Parliament also organize themselves into distinct entities: political groups, the Parliament’s power blocks. The European Parliament rules of procedure state that twenty-five members of the European Parliament with similar political affinities, originating from at least one-quarter of the member states, can form one.²⁶ The obvious benefits of an established political group revolve around both money and power: they are funded through a distinct budget line and gain speaking time during debates, chair meetings and parliamentary committees, and are able to draft and amend reports and opinions coming out of such European parliamentary committees.

Europarties and political groups are therefore distinct but linked. Members of the European Parliament who are members of European political parties are components of the Parliament’s political groups. Most of these political groups consist of more than one Europarty. It is not uncommon that Members of the European Parliament either change political groups during the five-year term or are asked to leave a political group. Moreover, some political groups contain (all or just a number of individual Members of the European Parliament associated to specific) national political parties or independent politicians not part of a Europarty (i.e. unaffiliated). On the other hand, some Members

²² Council of Europe, *supra* note 19, 6.

²³ Lightfoot, *supra* note 11, at 304.

²⁴ Art. 3(1)(b).

²⁵ Art. 17(1).

²⁶ EP Rules of Procedure, rules 32(1) and 32(2). At the time of introduction these establishment criteria were unsuccessfully challenged by the French Front National as exclusionary; C-486/01, Front National/ European Parliament, June 29, 2004.

Table 1. Groups, parties and foundations

POLITICAL GROUP	AFFILIATED EuPP	AFFILIATED EPF
Group of the European People’s Party (Christian Democrats)	European People’s Party	Wilfried Martens Centre for European Democracy
Group of the Progressive Alliance of Socialists and Democrats (S&D)	Party of European Socialists	Foundation for European Progressive Studies
Group of the Alliance of Liberals and Democrats for Europe (ALDE)	Alliance of Liberals and Democrats for Europe Party	European Liberal Forum
	European Democratic Party	Institute for European Democrats
	Europeans United for Democracy	Organization for European Interstate Cooperation
Group of the Greens/European Free Alliance (Greens—EFA)	European Green Party	Green European Foundation
	European Free Alliance	Coppieters Foundation
European Conservatives and Reformists Group (ECR)	Alliance for Conservatives and Reformists in Europe	New Direction—The Foundation for European Reform
	<i>European Free Alliance</i>	<i>Coppieters Foundation</i>
	European Christian Political Movement	Sallux
Confederal Group of the European United Left–Nordic Green Left (GUE–NGL)	Party of the European Left	Transform Europe
	<i>Europeans United for Democracy</i>	<i>Organization for European Interstate Cooperation</i>
Europe of Nations and Freedom (ENF)	Movement for a Europe of Nations and Freedom (MENL)	Foundation for a Europe of Nations and Freedom
	European Alliance for Freedom (EAF)	European Foundation for Freedom (EFF)
Europe of Freedom and Direct Democracy Group (EFDD)	Alliance for Direct Democracy in Europe (ADDE)	Institute for Direct Democracy in Europe (IDDE)
	Movement for a Europe of Liberties and Democracy (MELD)	Foundation for a Europe of Liberties and Democracy (FELD)
Non-aligned (NA)	Alliance of European National Movements (AENM)	European identity and traditions
	Alliance for Peace and Freedom (APF)	Europa Terra Nostra (ETN)

of the European Parliament linked to a specific European political party may not be able to join or form a political group and remain non-aligned, effectively barring them from any meaningful political impact as part of the European Parliament. Yet their Europarty can continue to be funded. In short, it requires trained eyes even for those who consider themselves specialists of EU politics to assess the ever-changing situation. Table 1 is an overview of a map of EuPP and EPF that have been active over past years.²⁷

Where do “populists” enter this picture? Hungarian Fidesz is part of the Europarty called European People’s Party, which forms the political group of the same name. Slovak Smer-Direction belongs to the Party of European Socialists Europarty and the political group of the same name, along with the Romanian Social Democratic Party and the Maltese Labour Party. Czech ANO is part of the Europarty called Alliance for Liberals and Democrats in Europe, which is one of several Europarties making up a political group of the same name. The UK Conservatives, Polish Law and Justice (PiS), and The Finns are part of a Europarty by the name of the Alliance of Conservatives and Reformists in Europe, which along with two other Europarties forms the European and Conservatives and Reformists political group. The Danish People’s Party (which is unaffiliated) belongs to this political group too. Greek Syriza is a member of the Europarty by the name of Party of the European Left. This is one of the components of the Confederal Group of the United Left–Nordic Green Left political group, to which unaffiliated Spanish Podemos belong as well.

The situation on the (far) right side is as complex. UKIP was the lead member of the Alliance for Direct Democracy (ADDE) Europarty. The accompanying Europe of Freedom and Direct Democracy (EFFD) political group also contains Italian M5S and (one part of the) German AfD. Belgian Flemish Interest, Italian Lega Nord, French Front National (now: Rassemblement National), and Austrian FPÖ belong to the Movement for a Europe of Nations and Freedom (MENL) Europarty. Together with the Dutch PVV and the (remainder of) German AfD, which are both unaffiliated, they belong to the Europe of Nations and Freedom (ENL) political group. Finally, a number of Members of the European Parliament coming from extreme right populist parties such as Greek Golden Dawn and Hungarian Jobbik were part of the Europarty by the name of Alliance for Peace and Freedom (APF), but non-aligned. Hence it is evident—and this is a central insight—that those considered “populists” nationally are surprisingly spread out over EuPP and political groups, including, crucially, over “mainstream” ones.

3. Regulation 1141/2014 and the birth of its EU values compliance mechanism

Against this background we can describe why and how the EU legislator worked on linking funding for European political parties and European political foundations to compliance with Article 2 TEU values. It is worthwhile to do this in detail. Not only

²⁷ Section 4 will explain how and why some EuPP and EPF recently failed to register or were deregistered, resulting in a discontinuation of their funding. The political groups continued to exist.

²⁸ All documents are publicly available from the EU institutions’ websites or other repositories. One helpful website for tracking older EU documents not easily found elsewhere is parltrack.eu.wiki.org/.

does this illustrate the convoluted and protracted trajectory of the Regulation’s birth²⁸ and why this legislation was perceived early on to target “populists,” but, more importantly, it shows that many elements eventually included in the mechanism had already been considered in one form or another, long before EU enlargement or direct linkage to Article 7 TEU, or any sign that that provision could one day be used. A longer view ensures a better analysis of the result and its likely usability. It also helps to contextualize oft-recurring calls for ever more additional procedures and actors.

The first proposal to regulate EuPP was tabled in February 2001.²⁹ The idea originated in a technical Court of Auditors’ demand for a proper legal basis enabling direct financing of Europarties instead of via the political groups’ budget line.³⁰ The Commission inserted substantive conditioning. It provided for a Europarty to be allowed to register if “its programme and its activities . . . respect the fundamental principles of democracy, respect for fundamental rights and . . . the rule of law.” Its justification was as follows³¹: “a European political party must be attached to [these principles] . . . it would not be acceptable for a party that preaches restrictions on rights, intolerance or xenophobia, whether it is for or against European integration, to enjoy public financial support.”

The European Parliament in its report took this at face value, summarizing it simply as a requirement to “provide evidence of the *democratic structure* of a party.”³² It also tabled an amendment aimed at clarifying that in case a Europarty acted contrary to fundamental principles it was to be suspended at the Commission’s request, after consultation with the European Parliament and the Council of Ministers.³³ As to monitoring, the Commission initially proposed that a “committee of wise men” check compliance with *all* EuPP registration conditions.³⁴ At the Parliament’s instigation, however—which argued that “the establishment of such a body should be considered only in exceptional cases, the European Parliament itself [being] in a position to assess compliance”³⁵—this element was removed. The task was handed to the European Parliament Bureau.³⁶ The Commission accepted this.³⁷

The revised proposal did not fly in the (pre EU-enlargement) Council of Ministers where—given the then Article 251 TEC (later Article 308 TEC, now Article 352 TFEU) residual legal base (used when a more specific provision was unavailable)—a unanimous decision of all member states was required. Lightfoot³⁸ reports that values compliance was a controversial element. He writes: “it was felt that [it] could lead to the removal of funding from a party because it was seen to lack respect for democratic values. . . . Both

²⁹ Proposal for a Council Regulation [on] [EuPP], COM(2000)898, February 13, 2001.

³⁰ *Id.* at 2 (referring to Court of Auditors Special Report 13/2000, OJ C 81, June 28, 2000). *Cf.* Lightfoot, *supra* note 11, at 305.

³¹ Proposal for a Council Regulation [on] [EuPP], *supra* note 29, at 3.

³² EP, Report on the [EuPP] proposal (rapporteur: Ursula Schleicher), A5-0167/2001, May 3, 2001, at 19 (emphasis added).

³³ *Id.* at 14 (amendment 21); OJ C34 E/254 of February 7, 2002 (voting record), and the Consolidated version of the EP amendments to the Commission Proposal in OJ C34 E/341 of February 7, 2002 (where it appeared as renumbered amendment 35 and article 5a).

³⁴ *Id.*

³⁵ EP, A5-0167/2001, May 3, 2001, at 10.

³⁶ COM(2001) 343, amended proposal for a Council Regulation [on] [EuPP], June 21, 2001, at 2.

³⁷ *Id.*

³⁸ Lightfoot, *supra* note 11, at 305.

the FPÖ in Austria and the Lega Nord in Italy were in coalition governments at the time and therefore represented at the Council. They felt this issue was an attack on them. Together with Denmark³⁹ they ended up voting against the proposal.”

This outcome resulted in another frequently used EU solution: try again, but with a different procedure. With the inclusion of Article 191(2) TEC (now Article 224 TFEU), the Nice Treaty moved to provide for a specific legal basis to regulate Europarties, crucially removing the unanimity requirement.⁴⁰ Upon its entry into force, the Commission immediately re-tabled its European Political Parties proposal⁴¹ for there to be rules in place for the 2004 European Parliament elections. Trying to navigate the last Parliament input⁴² and critical Council discussions, it repeated the insertion of a values clause while clarifying that “it would be inappropriate to establish intrusive or over-prescriptive political requirements for Europarty registration. . . .”⁴³ In terms of compliance control, the Commission retabled its proposal for a Committee of Wise Men.⁴⁴

The European Parliament sustained its support for values compliance⁴⁵ but debated the modalities. It was focused on “not [appearing to] be involved in . . . a ‘licensing’ procedure [but it] should be empowered . . . to carry out ex-post verification.”⁴⁶ Moreover, the Member of European Parliament pushing the file (the so-called rapporteur) favored a “neutral” body administering the funds and proposed that the Commission be in charge of this and more generally take the initiative in triggering it.⁴⁷ The Commission was unenthusiastic, presumably because it considered it too political a task for itself. It was not sustained in the text. Smaller right-wing populist political groups in the European Parliament, such as the Union for Europe of the Nations (UEN) and Europe of democracies and diversities (EDD) voted against.⁴⁸ In the Council the same member states remained opposed. But they were outvoted this time. Regulation 2004/2003⁴⁹ was a fact for the Europe of fifteen.

As a sign that significant implications were expected from EU values verification, several outvoted independent and “populist” Members of the European Parliament challenged the Regulation’s legality.⁵⁰ They argued that Europarties funding rules discriminated against smaller and minority political groups.⁵¹ Representation requirements

³⁹ The Danish government at that time relied on the support of Dansk Folkeparti, the populist Danish People’s Party.

⁴⁰ Its Declaration 11 related to article 191 and contained the following wording: “The provisions on the funding for political parties shall apply *on the same basis to all* the political forces represented in the EP.”

⁴¹ Proposal for a Regulation [on] [EuPP], COM(2003)77, February 19, 2003, at 2.

⁴² Cf. EP Report on the [EuPP] proposal (rapporteur: Jo Leinen), A5-0170/2003, May 21, 2003, at 24.

⁴³ COM(2003)77, *supra* note 41, at 2.

⁴⁴ *Id.* at 6 (art. 4—verification).

⁴⁵ EP Report on the [EuPP] proposal (rapporteur: Jo Leinen), A5-0170/2003, May 21, 2003, at 25: “*Of course* an [EuPP] receiving financial aid from the Union’s budget must respect” basic EU values (emphasis added).

⁴⁶ *Id.* at 9 (amend. 8).

⁴⁷ *Id.* at 11–12 (amend. 12). Cf. Lightfoot, *supra* note 11, at 307–308.

⁴⁸ Lightfoot, *supra* note 11, at 307.

⁴⁹ Regulation 2004/2003, OJ L 297/1, 15 November 2003.

⁵⁰ Case T-13/04, Bonde and others v. EP and Council, action brought on January 15, 2004; Case T-17/04, Le Front National and Seven Others v. EP and Council; Case T-40/04, Emma Bonino and Others v. EP and Council, action brought on February 6, 2004.

⁵¹ Case T-13/04, Bonde and others, *supra* note 50.

and unconditional value endorsement in their view violated freedom of expression and association. Most ingeniously, they maintained that equal treatment and democracy were put under pressure by treating politicians differently when not members of a Europarty, including because in practice they might be incapable of joining.⁵²

Curiously, the European Court of Justice rather formalistically dismissed their claims. It ruled that the claimants, even if elected political representatives with an individual mandate, were “not directly and individually concerned”⁵³ by the rules—its standard formulation for analyzing who can challenge an EU legislative act.⁵⁴ It did, however, clarify two matters. It implied, significantly, that, contrary to control of other requirements for Europarty formation, the one relating to asserting compliance with values was not digital but a question of gradation.⁵⁵ Again taking a formal line, it also dismissed equal treatment arguments, stressing that disadvantages of not being part of a European political party extended to Members of the European Parliament irrespective of political ideas.⁵⁶

After so much discussion, there was a rather loud silence. A first Regulation 2004/2003 evaluation report did not even mention the values compliance mechanism.⁵⁷ In 2007 the Commission proposed changes.⁵⁸ They left untouched values compliance and consisted principally of including EPF in the scope and creating more financial flexibility once given funding. The Parliament and Council (by now consisting of twenty-five member states) accepted the changes.⁵⁹ Regulation 1524/2007,⁶⁰ adapting Regulation 2004/2003, was therefore quickly adopted. A second Parliament evaluation reported no penalties imposed on any Europarty or EPF in the period of 2007 to 2011.⁶¹ The Regulation’s values verification provisions had remained a dead letter.

The Commission proposed revisions in September 2012.⁶² It made two highly significant additions without explaining them in the explanatory memorandum. First, as to the scope of the compliance obligation it suggested adding wording that to be considered a European political party, it must observe Article 2 TEU values in *its* program

⁵² This argument was made by the claimants in T-40/04; OJ C 94/49, April 17, 2003.

⁵³ Case T-13/04, July 11, 2005; Case T-17/04, July 11, 2005; Case T-40/04, July 11, 2005. Case T-17/04 was appealed, and then dismissed by the Court in C-338/05 P, *Le Front National and Others*, July 13, 2006.

⁵⁴ For a critique of the Court’s approach, including in the light of the Article 2 TEU value of democracy, see John Morijn, *Judgment of the General Court of 8 February 2018 in Case T-118/17, Institute for Direct Democracy in Europe/European Parliament*, in *ANNOTATED CASES ON THE EU CHARTER OF FUNDAMENTAL RIGHTS 2017–2018* (Aniel Pahladsingh ed., forthcoming 2019).

⁵⁵ Case T-40/04, para. 52.

⁵⁶ Case T-40/04, paras. 67–68.

⁵⁷ EP, Report on [EuPP] (2005/2224(INI)) (rapporteur Jo Leinen), A6-0042/2006, February 27, 2006; European Parliament resolution on [EuPP] (2005/2224(INI)), P6_TA(2006)0114.

⁵⁸ Proposal for a Regulation amending Regulation 2004/2003, COM(2007)364, June 27, 2007.

⁵⁹ EP, Draft report on [COM(2007)364] (rapporteur: Jo Leinen), 2007/0130(COD), July 24, 2007; EP, Report on [COM(2007)364] (rapporteur: Jo Leinen), A6-0412/2007, October 25, 2007; EP legislative resolution of November 29, 2007 on [COM(2007)364], P6_TA(2007)0562.

⁶⁰ Regulation 1524/2007 of December 18, 2007, amending Regulation 2004/2003 on [EuPP], OJ L 343/5, December 27, 2007.

⁶¹ EP resolution of April 6, 2011, on [Regulation 2004/2003], P7_TA(2011)0143, point AB; the preparatory report is EP, Report on the application of Regulation 2004/2003 (rapporteur: Marietta Giannakou), A7-0062/2011, March 18, 2011.

⁶² Proposal for a Regulation [on] [EuPP] and [EPF], COM(2012)499, September 12, 2012.

⁶³ *Id.* at 12 (art. 3) (emphasis added).

and its activities, and through those of its members.⁶³ Second, the Commission proposed a further widening in that “any natural or legal person may, at any moment, introduce a motivated request to the EP to verify compliance with . . . values.”⁶⁴ Although available documentation does not entirely clarify this, the Parliament seems to have embraced neither of these extensions.⁶⁵

The real bottleneck in the negotiations appeared in the Council of Ministers. A legislative state of affairs document produced eight months into the negotiations on the file described as a key concern “an appropriate balance between respect for standards of governance and transparency . . . and the freedom of association and the independence of European Political Parties and European Political Foundations. . . .”⁶⁶ The member state presiding over Council meetings was given mandate by the other member states to explore possible alternatives regarding the handling of registration of EuPP and EPF including values compliance.⁶⁷ Discussions centred on “who and how” regarding decision-making relating to delisting in case of a values breach.⁶⁸ This led, in July 2013, to negotiations between the Commission, Parliament, and Council about setting up an independent authority for that purpose⁶⁹—and to an agreement by December 2013.⁷⁰

In September 2013, discussions revealed that most member states were in favor of limiting possibilities for delisting only in cases of *manifest and serious* violations. A few wanted either a European Parliament’s or Council’s objection to a decision to deregister to suffice,⁷¹ but they did not get their way. Most significantly, by late January 2014 the possibility to focus not only on a Europarty *as a unit* but also on its individual constitutive member national parties had disappeared.⁷² In late February 2014 a final text was circulated for final approval by both co-legislators.⁷³ The European Parliament agreed in April,⁷⁴ the Council in September.⁷⁵

⁶⁴ *Id.* at 19 (art. 7(3)) (emphasis added).

⁶⁵ EP, Report on [COM(2012)499] (rapporteur: Marietta Giannakou), A7-0140/2013, April 23, 2013. Curiously, regarding the first element (“and through those of its members”) the text of the Commission proposal is not reproduced correctly (at 15). Regarding the second element (natural or legal person should be able to trigger verification), the explanatory memorandum suggests this to be a good idea (at 45) (“the rapporteur believes that this verification should be carried out annually or following a motivated and duly justified request by any natural or legal person”) while the relevant amendment in fact deletes this Commission idea (at 23–25—amend. 45).

⁶⁶ Council document 8106/13, April 5, 2013, at 4.

⁶⁷ Council document 15725/13, November 8, 2013, at 2, point 4.

⁶⁸ *Id.* at 2, point 5.

⁶⁹ *Id.* at 2, point 6.

⁷⁰ Council document 6457/14, February 14, 2014, p. 2, point 5.

⁷¹ Council document 15725/13, *supra* note 67, at 4, point 7.

⁷² Council document 5517/2/14 REV 2, January 29, 2014, at 4, para. 11.

⁷³ Council document 7108/14, February 28, 2014.

⁷⁴ Council document 9014/14, May 6, 2014.

⁷⁵ Council document 14701/14, September 30, 2014. Two member states voted against, one abstained. The Netherlands was most principled in its objection. It stated its attachment to the independent position of political parties, and that it should (only) be up to voters or judges to assess programs and activities of EuPP; Council document 13274/14 ADD1 REV2, September 24, 2014, at 1–2.

⁷⁶ Article 6(2), second subparagraph.

Eventually the negotiations led to the following procedure. The Authority was set up with the task of registering EuPP and EPF, and controlling and sanctioning them.⁷⁶ A standard form was developed to declare compliance with EU values at the registration phase.⁷⁷ As it is specified that the Authority needs only ascertain that the form is filled in,⁷⁸ this initial step is essentially one of self-certification. The Authority can verify the compliance of programs and actions with EU values.⁷⁹ It needs to do so when instructed by the Commission, the Council, or the Parliament,⁸⁰ when a member state where the Europarty or EPF is officially seated notifies the Authority,⁸¹ or when the Authority itself receives signals about problems with values compliance.⁸² For a compliance check a Committee of Independent Eminent Persons is to be asked for advice.⁸³ The Authority next needs to decide whether to follow the Committee's opinion and decide about deregistration.⁸⁴ It can only do so in the event of a “manifest and serious breach” of values.⁸⁵ This decision is to be communicated to the Council and Parliament, which can object to it only on grounds related to the compliance assessment.⁸⁶ If both object, deregistration is blocked.⁸⁷

Regulation 2018/673, amending Regulation 1141/2014, brought further tweaks. The most important one was that general registration requirement for Europarties was tightened. Only member *parties*, and no longer *individuals* holding an elected mandate in a member state, could satisfy the requirement of minimum European representation.⁸⁸ Moreover, the national party could only be a member of *one* European political party.⁸⁹ Both measures were put in place “to prevent the same national party from artificially creating several European Political Parties with similar or identical tendencies.”⁹⁰ Two further notable amendments were made. First, probably from the viewpoint of better regulation, it was opted to spell out the full list of values of Article 2, first sentence TEU in the recitals too.⁹¹ More strikingly, it was clarified that *citizens* can address a reasoned request to the Parliament to induce it to lodge a question for verification of compliance with Article 2 TEU values with the Authority.⁹² No explanation of this inclusion is given, suggesting it was seen as a technicality linking possibilities in the Regulation to a

⁷⁷ Article 8(2)(a) and Annex.

⁷⁸ Article 9(3) Regulation. Copies of these forms are available on the APPF website.

⁷⁹ Articles 10(3) and 10(4) juncto Articles 3(2)(c) and 3(3)(c).

⁸⁰ Article 10(3), first subparagraph.

⁸¹ Article 10(3), first subparagraph juncto Article 16(3) first and second subparagraphs, respectively.

⁸² Article 10(3), second subparagraph.

⁸³ Article 10(3), second subparagraph, second sentence.

⁸⁴ Article 10(3), fourth subparagraph.

⁸⁵ Article 10(3), fifth subparagraph and Article 11(3), first subparagraph.

⁸⁶ Article 10(4), second subparagraph.

⁸⁷ Article 10(4), first subparagraph, last sentence.

⁸⁸ Article 3(1)(b), first subparagraph—amended.

⁸⁹ Article 3(1)(ba).

⁹⁰ Regulation 2018/673, recital 4.

⁹¹ Recital 12. In this way it reflects the wording of Article 3(1)(c) verbatim.

⁹² Article 10(3), first subparagraph—amended by Regulation 2018/673.

Table 2. Development of the Regulation's values verification

	Subject	Values	Standard of review	Triggering	Verification of compliance
Commission proposal 2001 (COM(2000) 898 and COM(2001) 343)	EuPP	Fundamental principles of democracy, respect for fundamental rights and the State based on the rule of law (article 1(b))	Not specified	Not specified	Bureau of the EP (article 3)
	EuPP	Principles on which the EU is founded, namely liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (article 3(1)(c))	Not specified	— ¼ of EP membership — Representing at least three EP political groups (article 5(2), first subparagraph)	— Hear representatives of relevant EuPP (article 5(2), second subparagraph — Ask a three-member committee of independent eminent persons for an opinion (article 5(2), second subparagraph) — Decision by majority of EP members (article 5(2), first subparagraph)
Regulation 2004/2003					
Regulation 1524/2007 (amending Regulation 2004/2003)	EuPP/EPF	unchanged	unchanged	unchanged	unchanged, supplemented by EP rules of procedure: rule 22 3a, 224 and 225 (transitional regime for funding received for the 2014, 2015, 2016 and 2017 budget years)
	EuPP/EPF	Reference to Article 2 TEU: Respect for dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, [Pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men]	— Manifest and serious breach of Article 2 TEU (article 10(3), fifth subparagraph)	— EP, acting on its own initiative or following a reasoned request from a group of citizens submitted in accordance with the relevant provisions of its Rules of Procedure, or Commission or Council (article 10(3), first subparagraph—as amended by Regulation 2018/673) — Authority “becoming aware of facts which may give rise to doubts concerning compliance” informs EP, the Council, and the Commission for them to decide within two months whether to trigger (article 10(3), second subparagraph) — member state where EuPP/EPF has its seat or member state where EuPP/EPF employs activities that seriously fail to comply with national law linked to Article 2 TEU values (article 16(3))	— Authority requests an opinion from a six-member Committee of Independent Eminent Persons (article 10(3), first subparagraph, second sentence) — Authority produces duly reasoned decision (having regard to committee’s opinion) as to whether or not to deregister the EuPP/EPF concerned, and communicates a decision to deregister to the EP and Council (article 10(3), fifth subparagraph; article 10(4), first subparagraph) — EP and Council together either indicate they do not object, or that they do object to the Authority’s decision on grounds related to the compliance assessment. The latter results in the EuPP/EPF remaining registered (article 10(4), first and second subparagraph).

broaden the right to petition the EP. The Regulation’s values compliance mechanism, and its development over time, is visualized in Table 2.

4. Operationalizing the Regulation’s values compliance mechanism and beyond

The values verification mechanism entered into force on January 1, 2017. The Authority is functioning and members of the Committee were appointed.⁹³ This section will analyze questions relating to operationalizing the Regulation following the logic of Table 2. First Section 4.1 addresses some general issues with regard to the *scope* and *focus* of the compliance check and the *standard of review*. Second, Section 4.2 highlights challenges regarding the *triggering* of the mechanism. Finally, Section 4.3 considers some topics relating to the *compliance check itself*.

4.1. Scope, focus, and standard of review of the mechanism

A first aspect has to do with the combined effect of registration conditions. Recent tighter rules, clarifying that *only* national political parties can be a member of *just one* Europarty, have led to the deregistration and a nonapproved registration of two right-wing populist EuPP and their corresponding EPF⁹⁴ (see Table 3). For other right-wing populist Europarties

Table 3. Effects of Regulation 1141/2014

EuPP	AFFILIATED EPF	STATUS (all previously recognized and/or funded after 2014)			
		Registered by APPF	Application not approved by APPF	Removed from register by APPF	Never registered
European People's Party		x			
	Wilfried Martens Centre for European Democracy	x			
Party of European Socialists		x			
	Foundation for European Progressive Studies	x			

⁹³ European Commission, European Political Parties: Committee of Independent Eminent Persons Now Complete, July 26, 2017, available at http://europa.eu/rapid/press-release_MEX-17-2168_en.htm. The members are Meglena Kuneva, António Vitorino, Maria Emilia Casas, Carlo Casini, Rebecca Adler-Nissen, and Christophe Möllers.

⁹⁴ APPE, Press release: Implementation of Regulation 2018/673 amending Regulation 1141/2014, September 27, 2018.

Table 3. (continued)

EuPP	AFFILIATED EPF	STATUS (all previously recognized and/or funded after 2014)			
		Registered by APPF	Application not approved by APPF	Removed from register by APPF	Never registered
Alliance of Liberals and Democrats for Europe Party		x			
	European Liberal Forum	x			
European Democratic Party		x			
	Institute for European Democrats	x			
Europeans United for Democracy					x
	Organization for European Interstate Cooperation				x
European Green Party		x			
	Green European Foundation	x			
European Free Alliance		x			
	Coppieters Foundation	x			
Alliance for Conservatives and Reformists in Europe		x			
	New Direction—The Foundation for European Reform	x			
European Free Alliance		x			
	Coppieters Foundation	x			
European Christian Political Movement		x			
	Sallux	x			
Party of the European Left		x			
	Transform Europe	x			
Europeans United for Democracy					x
	Organization for European Interstate Cooperation				x

Table 3. (continued)

EuPP	AFFILIATED EPF	STATUS (all previously recognized and/or funded after 2014)			
		Registered by APPF	Application not approved by APPF	Removed from register by APPF	Never registered
Movement for a Europe of Nations and Freedom		x			
	Foundation for a Europe of Nations and Freedom	x			
European Alliance for Freedom (EAF)					x (party dissolved in 2016)
	European Foundation for Freedom (EFF)				x
Alliance for Direct Democracy in Europe (ADDE)					x
	Institute for Direct Democracy in Europe (IDDE)				x
Movement for a Europe of Liberties and Democracy (MELD)					x (party dissolved in 2015)
	Foundation for a Europe of Liberties and Democracy (FELD)				x
Alliance of European National Movements (AEMN)				x	
	European identity and traditions		x		
Alliance for Peace and Freedom (APF)				x	
	Europa Terra Nostra (ETN)			x	

and their Foundation the bottleneck was the written pledge of allegiance with Article 2 TEU. If registration means transparency, and transparency means an open subjection to EU values that one would want to actually reject or discuss politically, that for some seems a bridge too far. In this way the inclusion of values language has had a chilling effect.

Zooming in on the specifics of the values verification mechanism after registration, an initial question relates to *which* Article 2 TEU values to consider. At one level this appears easy: the Regulation only spells out those *in the first sentence*.⁹⁵ Yet there are strong arguments to consider *all* principles listed in Article 2 TEU, which is referred to in Article 7 TEU, in general terms, as a package.⁹⁶ This is important because, as was shown, illiberal political action in Europe can be equally in tension with EU values listed in the second sentence: pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men. In any event, as a matter of consistency and coherence, there is no reason to operate a more limited normative scope when it comes to EU-level values compliance than to the member state level. After all, the same actors are involved, albeit at different levels of government.

As a result of the discussions among member states in the Council, the standard of review is that of a “manifest and serious breach.” Interestingly, this language varies from that in Article 7 TEU. Article 7(1) TEU speaks of a “clear risk of a serious breach.” Article 7(2) TEU mentions the existence of a “serious and persistent breach.” This raises the issue of whether the Regulation intended to lay down a different standard, and if so, in what respect and why? Its text and drafting history do not help. Given the cumulative articulation we could, as a matter of legal interpretation, consider what “manifest” adds to “serious,” or how it was defined in opposition to (only) “risk.” Perhaps the thinking was that in order to avoid (European) (party) political pressure to trigger the mechanism not just any theoretically serious breach should be considered relevant. It should have manifested itself. But that is already covered by the notion that the compliance with the values is to relate to EuPP/EPF’s “programme and its activities.”⁹⁷ It therefore seems a reasonable reading that manifest and serious could be considered similar to serious in Article 7(1) TEU, but that the breach should not be purely theoretical. It must have somehow materialized. It is not, in other words, a speculative assessment of likely implication, but a review of the seriousness of what has already occurred.

There are additional reasons for this reading. In actual practice the focus will be on “actions.” If the very intention of registration was to get access to funding, it is unlikely that a EuPP or EPF will include language directly at odds with Article 2 TEU. Why self-incriminate at a stage of self-certification? As we have seen, this will result in a decision not to register in the first place, vacating the possibility of getting any EU funding. Moreover, in terms of values verification, it will also be much easier to focus on acts rather than just words as this will provide more context to any assessment.

As to the focus, at first sight the story of the drafting history points to a reading that the Regulation intends for the compliance check to relate to a EuPP *as a unit*. The Commission, it will be recalled, initially proposed for this to extend to the actions of the *individual* national political parties together making up a Europarty.

⁹⁵ Recital 12, Articles 3(1)(c) and 3(2)(c).

⁹⁶ Klamert & Kochenov, *supra* note 1, at 15–16 (point 5).

⁹⁷ Article 3(1)(c).

Why is this of great practical significance? As was shown, “mainstream” EuPP also have illiberal members with a track record of undermining Article 2 TEU. Therefore, limiting the assessment to a Europarty *as a whole* would function as a major restriction, de facto rendering many of the most problematic actors in the European Parliament outside the Regulation’s reach. This reading would, from the perspective of Article 2 TEU, result in an uneven mechanism given that it seems politically and institutionally tailored to be triggered against Europarties with (almost) exclusive illiberal membership. This potentiality would of course have far-reaching undesirable implications. It would lead to the conclusion that in its current set-up the Regulation only offers a partial response to those parliamentary actors endangering Article 2 TEU. But it could have even wider and even further-reaching consequences.

If the tendency toward an *en bloc* approach were to materialize, it could, if uncorrected, entrench rather than alleviate the European Parliament’s “populist” problem. It could lead to a perverse impetus for illiberal actors to “seek refuge” in a “mainstream” EuPP.⁹⁸ This is not as unlikely as one might hope as the current set-up suggests interest on both sides. The requirement for both the establishment of a Europarty and a European Parliament political group for membership to come from a quarter of member states plays an important role here. Particularly in smaller EuPP and political groups this criterion, designed to guarantee broad European representativeness and prevent political fragmentation in how the Parliament functions, can result in making “throwing out bad apples based on Article 2 TEU issues” very unattractive. It is politically costly when requirements to initiate cooperation are no longer fulfilled and the Europarty or political group ceases to exist.

This dilemma would of course be solved if individualized assessment of Article 2 TEU compliance for EuPP would be brought into practice after all. Arguably that is necessary for the reason that it is paramount to avoid tension with Article 7 TEU. If the law allows addressing the fallout of illiberal action in a *specific* member state based on Article 7 TEU, what could justify the Regulation disallowing this *targeted* approach at the EU level if the very same national political party (now a component of a Europarty) is involved? This is simply a matter of legal coherence and consistency: lower-level Union law (the Regulation) should be read in the light of the treaty text itself (Articles 2 and 7 TEU). If this reasoning would not be accepted in practice, there is clearly a need for the EU legislator to reconsider this once the Regulation is evaluated, scheduled for December 2021.⁹⁹

In the meantime, in a self-sanitizing move, nothing prevents “mainstream” EuPP and European Parliament political groups to implement their own system of EU values compliance checking, or rules on cooperation with other mainstream parties that depend in part on the votes of “bad apples.” In this way they could put principle above

⁹⁸ As Kelemen, *supra* note 6, at 113, has insightfully observed: “[W]ith EU-level political parties . . . gaining greater power, incentives intensify for the leaders of [EuPP] to protect national autocrats who deliver votes to their coalition at the EU level.”

⁹⁹ Article 38, first subparagraph—adapted with Regulation 2018/673.

power. Members of the European Parliament could equally reconsider minimum geographical requirements for setting up political groups, making it less difficult to establish political groups. In balancing securing Article 2 TEU values with policy objectives of EU-wide representativeness as well as preventing fragmentation within the European Parliament, the first simply needs to prevail. This non-legislative method of addressing the problem that “populism” poses, appears in many ways more targeted and suited to getting to the heart of dealing with illiberalism within the Parliament.

4.2. Triggering of the mechanism

The first interesting element is that next to Parliament itself also the Council of Ministers (i.e. the member states) and Commission are now in a position to request the triggering of the compliance test. The Parliament has formulated provisions for how to do this.¹⁰⁰ For it to trigger the mechanism, one-quarter of the component Members of the European Parliament representing at least three political groups are needed.¹⁰¹ This again likely means in practice that it is virtually ruled out that illiberal elements within mainstream political groups are targeted. Politically, they are more than likely to protect each other, even against each other’s “rogue elements” trying to fight for EU values. Yet, triggering is likely to happen when mainstream political groups, working together, want to target smaller ones composed (almost) exclusively of illiberal actors.¹⁰² The situation for the Council of Ministers is different. Here again the relevance of the close connection between national and EU-level political activity of the same political party becomes evident. For one is hard pressed to think of a scenario where the collection of twenty-eight (soon twenty-seven) member states would want to trigger this mechanism vis-à-vis a Europarty which by definition is composed of member parties from at least one-quarter of them.¹⁰³

The Commission’s position is most interesting. Will it see this avenue as an additional tool for compliance with Article 2 TEU values at member state level? Could it be convinced to request the Authority to trigger the Regulation regarding the EuPP containing the ruling party or parties in a particular member state against which it intends to take action (e.g. through Article 7 TEU)? This has an evident political dimension as well. How likely is such Commission action against a Europarty contained in political groups that has put forward the Commission president, or that otherwise forms part of the Parliamentary majority? The Commission did not take this route in its recent actions vis-à-vis Poland, even if the Polish PiS ruling party (member of the ECR political group) was not co-constitutive of the parliamentary majority. But an instrument in the Commission’s hands with potential value for wider Article 2 TEU

¹⁰⁰ EP Rules of Procedure, rule 223a.

¹⁰¹ *Id.*, rule 223a(2).

¹⁰² In fact, it has happened in a procedure against the Alliance for Peace and Freedom EuPP. The EP Constitutional Affairs Committee (AFCO) conducted a hearing with representatives from the Alliance for Peace and Freedom (APF) on February 9, 2017. As shown above, the APPF has since removed this EuPP from the register.

¹⁰³ Article 3(1)(b) Regulation.

compliance induction it is. And perhaps one that could actually help the Commission politically in its rule of law actions. Simultaneous EU- and member state-level action to react to the same facts would make for more consistent action that involves, and makes co-responsible, not only the member states through the Council but also the Parliament.

In a scenario of a serious failure to fulfill relevant *national* legal obligations regarding matters relating to elements affecting respect for EU values, member states where Europarties and EPF have their legal seat may address a request to the Authority for deregistration identifying in detail illegal actions and specific national requirements violated.¹⁰⁴ Member states in which EuPP and their EPF do not have their seat but are nonetheless active have the same possibility. This raises two questions: what material scenarios could be relevant here? And what would lead a member state to use this possibility?

As to the first, one could think of substantive additional national legal registration requirements for Europarties, such as a requirement for *any* parties active on the territory to apply gender equality on their candidate lists such as in some Scandinavian member states. As to the second, it is once again hard to conceive of a scenario where a member state would opt to wade into an EU-level highly political compliance check that would expose its national legislative specificities when it comes to handing political parties. It seems likelier, if this were ever considered for national political reasons that the member state would try to generalize the problem and frame it as something for the Council of Ministers as a whole to trigger.

One of the innovative aspects of the 2012 Commission proposal was that *individuals* could also request to trigger the compliance check. This element did not initially survive in the 2014 negotiations. Yet this element has resurfaced with Regulation 218/673. A “group of citizens” can submit a reasoned request to the European Parliament in accordance with its Rules of Procedure.¹⁰⁵ This could then lead the Parliament to send the Authority a request for verification of compliance with Article 2 TEU. This is evidently a potentially valuable way to put pressure on the Parliament to move to an assessment of whether EuPP and their EPF act in accordance with the Regulation. In addition, the Authority itself has a signaling possibility to the member states (Council), Commission, and Parliament where it becomes aware of facts which may give rise to doubts as to compliance with EU values, so that the political institutions can assess whether they want to lodge a verification. The relevant question is how the Authority could give hands and feet to this competence in practice in a way for that to have added value over competences and access to open source materials that the three mentioned EU institutions have themselves.

4.3. Verification of compliance

Finally, the Regulation’s compliance check itself raises several questions. When so requested by the Authority, the Committee is to give its opinion within two months.¹⁰⁶

¹⁰⁴ Article 16(3).

¹⁰⁵ Article 10(3), first subparagraph—amended by Regulation 218/673.

¹⁰⁶ Article 10(3), first subparagraph, last sentence.

As noted above, the European Court of Justice, in one of the few instances in which it has given substantive guidance in this area, has described the EU values-related registration condition as not a black-and-white matter but one of judgment.¹⁰⁷ That legal qualification seems to still hold true. However, in the Regulation (and unlike in Article 7 TEU) there is some substantive guidance regarding the assessment to be made as well. Opinions are to give full consideration to freedom of association and to the need to ensure pluralism of political parties in Europe.¹⁰⁸ This was included because during the negotiations, some member states kept principled objections to values compliance checks for political parties specifically, given their crucial place in the DNA of the democratic process.

At one level, this instruction could be seen as simply a reaffirmation of what is already inherent in any balanced Union law assessment: the whole of Article 2 TEU, the EU Fundamental Rights Charter, and the rest of the EU Treaties will need to serve as the broader interpretational context. Alternatively, this could be read as an instruction to interfere with actions by political parties *as a last resort* only, not just keeping de facto implications on political pluralism in the European Parliament in mind but putting them at the very forefront of the compliance check. After all, at this stage we would be dealing with European political parties and foundations whose registration was initially cleared and that have therefore pledged their allegiance to Article 2 TEU.

The Authority will, upon receiving the Committee's opinion about EU values compliance in the case under consideration, need to decide whether or not to propose deregistering. This decision is to be duly reasoned. Given the resources available to the Authority and the fact that the facility to request external expertise implies the EU legislator's preference for that route, it is unlikely to involve a (second) substantive assessment of the facts or the law by the Authority itself. Yet, the Authority is independent.¹⁰⁹ Nothing could prevent it from doing so if it decided to. Moreover, all of its decisions are subject to European Court of Justice review.¹¹⁰

The task of the European Parliament and member states in the Council of Ministers in assessing the Authority's decision based on the Committee's opinion would at this stage be highly charged. The fact that the Parliament and the Council would *both* need to agree to overturn a decision by the Authority to deregister a Europarty or EPF would make this step in the procedure at once more political but less likely to be politicized between the two EU institutions. Moreover, their separate or joint objection could be substantiated only on grounds related to the assessment with the conditions for registration.¹¹¹ Where the Authority would arguably be unlikely to second-guess what the Committee would put before it, it would at that stage perhaps be different for the European Parliament and Council. They could feel they needed

¹⁰⁷ Case T-40/04, para. 52.

¹⁰⁸ Article 11(3), second subparagraph.

¹⁰⁹ Article 6(2), first subparagraph, second sentence.

¹¹⁰ Article 6(11).

¹¹¹ Article 10(4), second subparagraph.

a “second opinion” on the Committee’s opinion. After all, once again, the European Court of Justice has itself underlined that this is no black-and-white matter.

The question is: Who could provide a second opinion at that stage? And how much precious time would this add to the procedure again?¹¹² These may seem mundane or purely academic questions. But if anything they illustrate why proposals to add ever more institutions and instruments in the context of EU values compliance, such as Müller’s,¹¹³ should be critically assessed. For even in a setting with many institutional actors, independent or not, the hot political potato does not just vanish. Theory of militant democracy is not exempt from practical realities of institution-building, time constraints, and dealing with the issue yourself. In confronting the illiberal challenge at and from EU level, there is a real danger that focusing on ways to move around the potato distracts from considering the real issue: why does it remain so hot?¹¹⁴

In any event, the fact that in this Regulation (just as in the case of Article 7 TEU) the EU legislator has opted to leave the final decision at the political level is itself telling. This appears wise. Not only does it underline the legal, political, and democratic significance of (acting on) Article 2 TEU values, but—perhaps as important—it underscores that any defense of EU values does not only necessitate an addressee. It also requires an identifiable subject accountable for the assessment and willingness to take political responsibility not only for the design of the institutional set-up but also for the results it produces.

5. Conclusion

The story of how the Regulation’s values compliance mechanism originated and developed, and the questions of practice and principle raised by its operationalization, illustrates the complexities of making progress in ensuring Article 2 TEU compliance. It is not quite the jewel of better regulation. Without more it could remain a set-up that is inherently limited and limiting for confronting forces within the European Parliament whose agendas and actions are at odds with Article 2 TEU. Yet, it also offers opportunities to the Commission and EU citizens. In addition to some evident changes the Parliament could implement itself, these could be explored to remedy some of the Regulation’s shortcomings. In that way the Regulation’s values verification mechanism could yet develop into a useful tool to respond to politics at odds with Article 2 TEU values at EU level as well as the directly connected national level.

The story of this Regulation more generally offers a rich account of the EU legislator considering options to refine Article 2 TEU compliance. It could serve as a

¹¹² For a convincing argument that the Commission’s Rule of Law Framework has had the problematic effect of actually delaying decisive EU action vis-à-vis member states, see Pech & Scheppele, *supra* note 6.

¹¹³ Müller, *supra* note 6, at 150: “to create an entirely new institution that could credibly act as a guardian of Europe’s *acquis* normative, [a] ‘Copenhagen Commission’—a body with a mandate to offer comprehensive and consistent political judgments.”

¹¹⁴ For a similar viewpoint, see Petra Bárd & Dmitry Kochenov, Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement, RECONNECT Working Paper 1 (2018).

stepping stone to rethink options for EU institutions in their effort to come to comprehensive, concerted, and decisive action to act upon their legal obligation to protect Union law principles. One particularly poignant lesson may be limitations to thinking along the lines of creating ever more procedures and institutions. Hot potatoes do not tend to get colder over time—only moving them on harbors the risk that they may actually start to rot too. Defending the EU's basic values against populist or other threats is therefore most definitely to be seen as a legal but certainly also as a political commitment.